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NO. 75-605

In the Supreme Court of the United States

OCTOBER TERM, 1975

SANDRO MILO WYATT &
LIANE JEAN WILLOUGHBY,
Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO.

SANDRO MILO WYATT &
LIANE JEAN WILLOUGHBY,
Petitioners

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SANDRO MILO WYATT and LIANE JEAN WILLOUGHBY, Petitioners, pray to this Honorable Court that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which was final in this case on September 23, 1975.

OPINIONS BELOW

There is no published opinion by the District Court for the Southern District of Texas, Corpus Christi Division, the Trial Court in this cause. However, the Trial Court did enter an Order of Conviction which is attached hereto as Exhibit "A". The Court of Appeals wrote an unpublished opinion, affirming Petitioners' convictions, which is attached hereto as Exhibit "B".

JURISDICTION

The judgment of the Court of Appeals became final on September 23, 1975, when Petitioners' Motion for Rehearing and Suggestion for Rehearing En Banc was overruled by the Court of Appeals (see Exhibit "C" attached). The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254(1), since this is a Federal Criminal Case where review of the judgment of the Court of Appeals is sought by Writ of Certiorari.

QUESTIONS PRESENTED

This case presents the issue of whether the Petitioners' rights under the Fourth Amendment of the U. S. Constitution were violated by the Government, and whether the Courts below were in error in allowing the admission of evidence [marijuana] claimed by Petitioners to be admitted against them in contravention of the Fourth Amendment. Specifically, this case presents the issue of whether the rationale of *Almeida-Sanchez vs. U. S.*, 413 U.S. 266, 93 S. Ct. 2535 (1973), applies to Petitioners' case where the questioned search and seizure occurred on the 30th of October, 1972, but Petitioners' trial was not had until May 21, 1974, almost one (1) year after June 21, 1973, the date this Court announced its decision in *Almeida-Sanchez*, supra. Thus, the sole question presented for review is how far this Court will extend the doctrine of non-retroactivity. That is, should Petitioners be allowed to present as authority for their position to the Courts below this Court's analysis

of the Fourth Amendment [Almeida-Sanchez, supra] where, although *Almdida-Sanchez* was announced after the arrest of Petitioner, it was announced approximately one (1) year before Petitioners' trial.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment of the United States Constitution and Rule 41(e), Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE

The record in this case consists of the record on appeal and a transcript of proceedings. The record and transcript are now on file with the Clerk of the United States Court of Appeals for the Fifth Circuit.

Petitioners in this case were convicted for a violation of Title 21, U.S.C., Section 841(a), that is, unlawfully, knowingly, and willfully possessing with intent to distribute, a controlled substance, marijuana.

The arrest of Petitioners occurred near Falfurrias, Texas, on October 30, 1972 (Exhibit "A", P. 1). Petitioners' trial was had before the Trial Court on May 21, 1974 (SF., P. 250). The case was tried on stipulated facts (see Exhibit "D"). However, it is pointed out that the Petitioners did not admit to the truth of the stipulated facts (See Exhibit "A", p. 2). As can be seen from the stipulated facts, there is no

evidence whatsoever giving the Border Patrol Agents probable cause or even reasonable suspicion to open the trunk of the car in question. As can be seen from the stipulation, the only facts occurring prior to the search of the trunk of the automobile in question were as follows:

> "...On October 30, 1972, at about 11:40 P.M., Border Patrol Agents B. D. McNeal and Sam Santana of Falfurrias, Texas, halted a black 1967 Oldsmobile, 2-door bearing 1972 Illinois license RX1757, the registered owner being Sandro Milo Wyatt, at the Border Patrol Checkpoint, sixteen (16) miles south of Falfurrias on U. S. Highway 281, for a routine immigration check. The vehicle was driven by SANDRO MILO WYATT and occupied by LIANE JEAN WILLOUGHBY, both of 222 Locust, Elgin, Illinois. After determining that both occupants were United States citizens, the Patrol Agents requested WYATT to open the trunk for a search for illegal aliens..."

After questioning Petitioners as aforesaid, the Border Patrol Agents opened the trunk of the automobile in question and discovered the marijuana (See Exhibits "A" and "D"). Prior to the trial, the Appellants filed a Supplementary Motion to Suppress which clearly set forth Petitioners' contentions prior to trial that the search and seizure in question was an improper border search (see Exhibit "E").

The search and seizure in this case occurred approximately sixty-five (65) miles from the Mexican Border (SF., P. 43).

REASONS FOR GRANTING THE WRIT

THE TRIAL COURT AND THE COURT OF APPEALS WERE IN ERROR IN NOT APPLYING THE RATIONALE OF ALMEIDA-SANCHEZ TO THE SEARCH AND SEIZURE INVOLVED IN THIS CASE.

It is clear that the Trial Court did not apply the rationale of *Almeida-Sanchez v. United States,* supra, in the instant case. This is obvious from the Trial Court's Order which provides in part:

> "...The Court of Appeals for the Fifth Circuit has said in Miller that the Almeida-Sanchez decision is not to be applied retroactively; *we do not have to worry about it here...*" (Exhibit "A" P. 3) [emphasized by Petitioners]

The *Miller* case referred to by the Trial Court is the Fifth Circuit Decision of *U. S. v. Miller,* 492 F. 2d 37 (5th Cir. 1974). However, the *Miller* case is not analogous to the instant case for the reason that in the *Miller* case the accused's conviction had already been affirmed by the United States Court of Appeals for the Fifth Circuit prior to the announcement by the Supreme Court of the *Almeida-Sanchez* decision.

In addition, the Court of Appeals cites the recent cases uf *U.S.A. v. Bowen*, ____U. S., 95 S. Ct. 2569 (1975), and *U. S. A. v. Peltier*, ____U. S., 95 S. Ct. 2313 (1975) as authority for affirming Petitioners' convictions. However, Petitioners respectfully contend that neither the *Bowen* case, supra, nor the *Peltier* case, supra, is authority for extending the doctrine of non-retroactivity to Petitioners' case as concerns the application of *Almeida-Sanchez* to their case. That is, the *Almeida-Sanchez* decision, as it relates to the *Peltier* case, was announced while the *Peltier* case was on direct appeal. Similarly, in the *Bowen* case, the conviction had already been affirmed by the Court of Appeals for the Ninth Circuit and a Petition for Certiorari was pending when the *Almeida-Sanchez* decision was announced.

It would appear that the cases of *Williams v. U.S.*, 401 S. 646, 91 S. Ct. 1148 (1971) and *Fuller v. Alaska*, 393 U.S. 80, 89 S. Ct. 792 (1963) should apply to Petitioners' case. It is noted that they are discussed by the majority opinion of the Supreme Court in the *Peltier* case. The *Williams* case, supra, concerned how the new rule concerning the scope of searches incident to arrests as announced in *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034 (1969), would be applied when the *Chimel* decision was announced after the accused in the *Williams* case had been convicted and his case was on direct appeal. The Supreme Court declined to reverse the accused's conviction in the *Williams* case in that Chimel was announced after his [Williams] conviction. Concerning the standard to be applied at the trial of a case, the

Supreme Court had this to say in the *Williams* case:

> "...Both Petitioners [Elkanick and Williams] were duly convicted when judged by the then existing law; the authorities violated neither Petitioners rights either before or *at trial*..." [emphasized by Petitioners] 91 S. Ct. 1148, 1154

A similar holding can be seen in the case of *Fuller v. Alaska*, supra. In that case the accused was convicted of a shooting with intent to kill or wound, under state law, and was sentenced to 10 years. Evidence was introduced in his trial in violation of Section 605 of the Federal Communications Act, 47 U.S.C. Section 605. Subsequent to the accused's conviction in the state court, the Supreme Court in the case of *Lee v. State of Florida*, 392 U. S. 378, 88 S. Ct. 2096 (1968) held that evidence which is obtained in violation of Section 605 of the Federal Communications Act was not admissible in state criminal trials. Therefore, the question before the Supreme Court in the *Fuller* case was whether or not the rationale of the *Lee* case was to be applied retroactively. The Supreme Court held that since this was an exclusionary rule it was to be applied prospectively only and affirmed *Fuller's* conviction. However, in further explanation of its decision, the Supreme Court had this to say:

> "...Retroactive application of *Lee* would overturn every state conviction obtained in good faith reliance on *Schwartz*. Since this result is

> not required by the principle upon which *Lee* was decided, or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied *only to trials in which the evidence is sought to be introduced after the date of our decision in Lee...*" [emphasized by Petitioners] 89 S. Ct. 61, 62.

Although the *Williams* case and the *Fuller* case, supra, both denied the retroactive application of a new Supreme Court decision interpreting the Fourth Amendment, it is emphasized by the Petitioners that both the *Fuller case and the Williams* case involved situations where the accused had already been convicted before the new decision was announced by the Supreme Court. Petitioners are in a different situation; the Supreme Court announced its decision in *Almeida-Sanchez*, supra, almost one (1) year prior to Petitioners' trial. Petitioners strongly urge that the rationale of the *Williams* and *Fuller* cases means that the cut off date as the application of the principles of *Almeida-Sanchez* to their case is the date of the trial. This is the same reasoning that the Supreme Court utilized in *Johnson v. State of New Jersey*, 384 U. S. 719, 86 S. Ct. 1772 (1966) which held the cut off date for applying the principles of *Escobedo v. State of Illinois*, 378 U. S. 478, 84 S. Ct. 1758 (1964) and *Miranda v. State of Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966) was the date of the trial in which the evidence was attempted to be introduced.

In addition, the concern that the Supreme Court has had with the retroactivity question as set forth in *Stovall v. Denno*,

388 U. S. 293, 87 S. Ct. 1967 (1967) would not be applicable if the Trial Court had applied the rationale of *Almeida-Sanchez* in this case. That is, Petitioners urge that if the Trial Court had applied the principles of *Almeida-Sanchez* to their case at trial, it would not have had a deleterious effect on the administration of justice. Simply stated, Petitioners should have been entitled to have the law in effect at the time of their trial applied to their case.

CONCLUSIONS

For the reasons stated, Petitioners respectfully request that their Writ of Certiorari should be granted.

Respectfully submitted,

WESTERGREN & WESTERGREN
524 Petroleum Tower
Corpus Christi, Texas 78401
(512) 883-0843

By:
SAM A. WESTERGREN, JR.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served on the United States Government by depositing the same in the United States Mail with sufficient Air Mail Postage prepaid and addressing same to the Solicitor General, Department of Justice, Washington, D. C., 10530. In addition, service has been likewise made upon Mr. James R. Gough, Assistant U. S. Attorney, P. O. Box 61129, Houston, Texas 77061.

DONE on this the 21st day of October, 1975.

SAM A. WESTERGREN, JR.

APPENDIX A

ORDER OF CONVICTION FROM COURT BELOW

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION
(Filed: August 26, 1974)

CR. NO.
72-C-158
UNITED STATES OF AMERICA
V.
SANDRO MILO WYATT and LIANE JEAN WILLOUGHBY

O R D E R

These Defendants, Sandro Milo Wyatt and Liane Jean Willoughby, were charged, by indictment, with, on or about the 30th day of October, 1972, possessing with intent to distribute approximately two hundred fifteen (215) pounds of marihuana. These Defendants filed their motions to suppress the evidence, to wit, the marihuana involved, claiming the search was made without a valid warrant and without probable cause, in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States.

The Court, on April 10, 1974, held a hearing on such motions to suppress, and, at the same time, heard other

motions to suppress evidence obtained by seizures at the Border Patrol checkpoint approximately sixteen (16) miles south of Falfurrias, Texas. Government witnesses testified in detail concerning the location of the checkpoint and its operations. This Court has made findings of fact concerning the location of this checkpoint, and it has also set forth its conclusions of law in the memorandum dated the 26th day of July, 1974, in Criminal Action No. 73-C-75, *United States of America v. Jesus Sanchez-Garcia and Antonio Rios-Rodriguez,* and that memorandum is cited herein as the authority of this Court for its holding that the search and seizure in this case against these Defendants was a proper border search, or the functional equivalent of a border search, and the search and the seizure was valid. Since the findings of fact concerning the location and operations of the Falfurrias, 16-mile, checkpoint in this case are based on exactly the same evidence presented on April 10, 1974, by the government on direct and cross-examination byDefendants, we see no need to extend this memorandum to repeat what has already been said. A copy of such 73-C-75 memorandum is made a part of the record in this case for convenient reference.

At approximately 11:40 p.m., on October 30,1972, the Defendants Sandro Milo Wyatt and Liane Jean Willoughby, while driving north on U. S. Highway 281, were stopped at the Falfurrias Border Patrol checkpoint for a routine Immigration check. The stipulation entered into between the Defendants, with the advice of their counsel, and the United States sets forth the facts which the government witnesses

would testify to if they were to take the stand, but the Defendants did not further stipulate. The Court recognizes the Defendants do not admit the truth of the stipulated facts relating to the actual stopping of the vehicle and the search thereof.

It was also stipulated that the substance found in the vehicle occupied by Defendants on this occasion was, in fact, approximately two hundred fifteen (215) pounds of marihuana; and it was stipulated that the checkpoint involved in this case was the same checkpoint approximately sixteen (16) miles south of Falfurrias, concerning which testimony was heard on April 10, 1974.

The Court, at the conclusion of the presentation of this case upon the stipulation, and after having considered all of the testimony in connection with the motions to suppress, as set forth in 73-C-75 above cited, denied said motions and admitted the questioned evidence.

Defendant Wyatt, after his arrest and he had been properly advised of his *Miranda* rights, admitted knowledge that the marihuana was in the car, although his stories as to how he came by it, were conflicting. Defendant Willoughby, after her arrest and having been advised of her *Miranda* rights, denied knowledge of the marihuana, although some of it was in a suitcase belonging to her and she had marihuana in her purse. The evidence in this case, including the part which Defendants asked to be suppressed, establishes beyond a reasonable doubt that these Defendants Wyatt and Will-

oughby were guilty as charged. The Court so finds.

This Court is fully aware of *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973), and *United States v. Miller*, 492 F. 2d 37 (5th Cir. 1974). The violations which are the basis of this suit occurred prior to the decision of the Supreme Court of the United States in *Almeida-Sanchez*. The Court of Appeals for the Fifth Circuit has said in *Miller* that the *Almeida-Sanchez* decision is not to be applied retroactively; we do not have to worry about it here. This being the case, and since the search was made at a point which was a functional equivalent of the border, the Court concludes the search was valid. *United States v. Wright*, 476 F. 2d 1027 (5th Cir. 1973); *United States v. Thompson*, 475 F.2d 1359 (5th Cir. 1972); *United States v. McDaniel*, 463 F. 2d 1359 (5th Cir. 1972); *United States v. DeLeon*, 462 F.2d 170 (5th Cir. 1972).

The foregoing constitutes the findings of fact and the conclusion of law of this Court upon which the Court based its denial of the motion to suppress filed by the Defendants herein and its finding that the Defendants, Sandro Milo Wyatt and Liane Jean Willoughby, were guilty of possessing with intent to distribute approximately two hundred fifteen (215) pounds of marihuana, as charged in the indictment.

A copy of this order shall be furnished counsel for the government and for the Defendants. The government exhibits offered and admitted (1 through 12) on the suppress-

ion hearing, and presently in the file of CR. No. 73-C-75, *United States of America v. Jesus Sanchez-Garcia and Antonio Rios-Rodriguez,* are also a part of the record in this case.

SIGNED this 24th day of August, 1974.

s/ Owen D. Cox
UNITED STATES DISTRICT
JUDGE

APPENDIX B

OPINION OF THE COURT BELOW
UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

(DO NOT PUBLISH)

No. 74-3723
Summary Calendar*

UNITED STATES OF AMERICA
Plaintiff-Appellee,
versus
SANDRO MILO WYATT and LIANE JEAN WILLOUGHBY,
Defendants-Appellants

Appeal from the United States District Court for the
Southern District of Texas
(August 7, 1975)

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PERCURIAM: AFFIRMED. See Local Rule 21.[1]

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* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

1. See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F. 2d 966.

This pre-*Almeida-Sanchez*[2] case involving the Falfurrias checkpoint is affirmed pursuant to the United States Supreme Court decisions in Bowen v. United States, 422 U.S.___, 43 L. W. 5024 (June 30, 1975) and United States v. Peltier, 422 U. S.____, 43 L.W. 4918 (June 25, 1975). Appellants' argument that it was error to admit their statements because they had not been given a proper *Miranda* warning is frivolous. Willoughby's contention that there was insufficient evidence to sustain her conviction is without merit.

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2. Almeida-Sanchez v. United States, 413 U.S. 266, 93 S. Ct. 2535, 37 L.Ed. 2d 596.

APPENDIX C

ORDER DENYING PETITION FOR REHEARING

United States Court of Appeals
Fifth Circuit
Office of the Clerk

September 23, 1975

TO ALL COUNSEL OF RECORD

No. 74-3723 - U. S. A. vs. Sandro Milo Wyatt and
Liane Jean Willoughby

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk
By s/ Clare F. Sachs
Deputy Clerk

cc: Mr. Sam A. Westergren, Jr.
Mr. James R. Gough, Jr.

APPENDIX D

STIPULATION FROM U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

Filed May 21, 1974

UNITED STATES OF AMERICA
V
SANDRO MILO WYATT
LIANE JEAN WILLOUGHBY

CRIMINAL
No. 72-C-158

STIPULATION

It is hereby stipulated by and between the defendants herein, their attorney, and the United States of America, that if produced to testify herein, the government would produce the following witnesses who would testify as follows:

1. On October 30, 1972, at about 11:40 P.M., Border Patrol Agents B. D. McNeal and Sam Santana of Falfurrias, Texas halted a black 1967 Oldsmobile, 2-door bearing 1972 Illinois license RX1757 the registered owner being Sandro Milo Wyatt at the Border Patrol Checkpoint, sixteen (16) miles south of Falfurrias on U. S. Highway 281, for a routine

immigration check. The vehicle was driven by SANDRO MILO WYATT and occupied by LIANE JEAN WILLOUGHBY, both of 222 Locust, Elgin, Illinois. After determining that both occupants were United States citizens, the Patrol Agents requested WYATT to open the trunk for a search for illegal aliens. When WYATT opened the trunk, the Patrol Agents detected a strong odor of marijuana and observed four zipper-type and one ivory colored suitcase. A closer inspection revealed numerous brick-form packages of marijuana inside the suitcases.

2. Defendants WYATT and WILLOUGHBY were placed under arrest and advised of their rights as set forth in the *Miranda* Decision. They verbally acknowledged understanding their rights. While searching the defendants' vehicle and belongings for weapons, the Patrol Agents observed another ivory colored Samsonite suitcase on the rear floorboard. This suitcase also contained brick form packages of marijuana bringing to sixty-six (66) the total packages seized. About two ounces of refined marijuana was found in a plastic bag in the glove box and seized; as was two ounces of crude marijuana contained in a paper cup in Miss WILLOUGHBY'S purse.

3. Special Customs Agents T. L. Bowen and Jack Pitts were advised of the foregoing and proceeded to the Border Patrol Office at Falfurrias, Texas where Patrol Agents Mc Neal released the prisoners, vehicle and contraband to them. The marijuana was retained in the custody of Special Agent

Bowden until he released it to the seizure clerk.

4. Special Agent Bowen again advised SANDRO WYATT of his rights as set forth in the *Miranda* Decision and questioned him concerning the marijuana. WYATT said that he had driven from Illinois to the Mexican border for the purpose of purchasing marijuana because he heard it was "easy". He stated he met a Latin male on 10-30-72 at the What-A-Burger in McAllen, Texas, and made arrangements with him to purchase $5,000.00 worth of marijuana. WYATT said the Latin male brought him a sample of marijuana on 10-30-72 and at that time, he showed the dealer his money. He said he was in his room, # 163 at the Fairway Motel in McAllen, at about 6:00 P.M., on 10-30-72, when this Latin male and a helper, also Latin, brought him the marijuana and he paid them. WYATT later changed his story, stating that he had been hired, by persons he refused to identify from Elgin, Illinois, to transport marijuana for them. He said that he was given the $5,000.00 and instructed to go to McAllen, Texas, check into the Fairway Motel and wait for a phone call. He said he did as instructed, arriving at the Fairway on 10-30-72, about 10:00 A.M. He said he received a call from an unknown Latin male who told him to leave his keys in his car and stay in the room for about six hours. The Latin male reportedly would take the vehicle, load it with marijuana and return it. WYATT said he left the keys in the vehicle and slept until 6:00 P.M. When he checked, at that time, the vehicle had been returned and was loaded with marijuana. WYATT had no explanation

as to how the $5,000.00 was paid to the dealer. At the time of his arrest, he had only $105.00 in his possession.

5. Special Agent Pitts again advised LIANE JEAN WILLOUGHBY of her rights as set forth in the *Miranda* Decision and questioned her concerning the marijuana. She said that she had been living with WYATT for some time and that they had driven to McAllen because WYATT said he wanted to visit some friends. She said they arrived at McAllen on 10-30-72 at 10:00 A.M. and checked into the Fairway Motel. She stated that she went to sleep and WYATT left, but returned in a few hours and also went to sleep. She stated that she did not know where he had gone, unless it was to visit friends and that they later awoke and left for Elgin, Illinois. She said she did not know that the marijuana was in the vehicle. When asked about the marijuana found in her possession,she said that WYATT had given it to her. She claimed ownership of the two ivory colored Samsonite suitcases, but said she did not know how the packages of marijuana got in them.

6. It is hereby stipulated that the substance found in the vehicle on this occasion, occupied by the defendants, was in fact approximately 215 pounds of marijuana. This stipulation only relates to the sixty-six packages of marijuana.

7. It is hereby stipulated that the Border Patrol Checkpoint at which the defendants herein were stopped was the same checkpoint located 16 miles south of Falfurrias concerning which testimony was heard on April 10, 1974 and

and that said testimony constitutes part of the record in this cause.

8. It is also stipulated that there was no search warrant involved in this case. It is further stipulated that neither WYATT nor WILLOUGHBY consented to the search in this case.

9. In stipulating that the Government witnesses would testify as set forth above, these Defendants reserve the right during trial to object as to the admissibility of any of the stipulated testimony.

It is so stipulated this the 21 day of May, 1974.

s/ Sandra Milo Wyatt
SANDRO MILO WYATT
Defendant herein

s/ Liane Jean Willoughby
LIANE JEAN WILLOUGHBY
Defendant herein

s/ Sam A. Westergren, Jr.
SAM A. WESTERGREN, JR.
Attorney for both Defendants

ANTHONY J. P. FARRIS
United States Attorney

By: s/ Stephen Rice
B. STEPHEN RICE
Assistant United States Attorney

APPENDIX E

SUPPLEMENTARY MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CRIMINAL NUMBER 72-C-158

UNITED STATES OF AMERICA
V.
SANDRO MILO WYATT
LIANE JEAN WILLOUGHBY

SUPPLEMENTARY MOTION TO SUPPRESS EVIDENCE AND STATEMENTS

TO THE HONORABLE JUDGE OF SAID COURT:

Come now SANDRO MILO WYATT and LIANE JEAN WILLOUGHBY, the Defendants in the above cause, and as additional grounds for their Motion to Suppress Evidence and Statements in the above cause hereby request that the Court consider the following grounds to suppress the evidence in this case, in addition to the grounds set forth in their original Motion to Suppress Evidence and Statements:

a. The search was not a proper border search nor one performed at a functional equivalent of the border.

b. The arrest and search of the Defendants occurred at a distance too far removed from the border of Mexico and the United States to be a proper border search.

c. That the laws relied upon by the Government in this case, namely 8 USC § 1357a and the accompanying regulation, 8 CFR § 287.1(a) (2) are unconstitutional and should not be allowed by the Court to sustain a search in this case.

Respectfully submitted,

WESTERGREN & WESTERGREN
902 Guaranty Bank Plaza
Corpus Christi, Texas 78401

BY: s/ Sam A. Westergren, Jr.
SAM A. WESTERGREN, JR.
Attorneys for Defendants
Sandro Milo Wyatt
Liane Jean Willoughby

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Motion for Leave to File Supplementary Motion to Suppress Evidence and Statements and the attached Supplementary Motion to Suppress Evidence and Statements was this date delivered to Mr. Steven Rice, Assistant U. S. Attorney at his office in the Federal Courthouse, Corpus Christi, Texas.

DONE this the 17th day of May, 1974.

s/ Sam A. Westergren, Jr.
SAM A. WESTERGREN, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-605

SANDRO MILO WYATT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a bench trial on stipulated facts in the United States District Court for the Southern District of Texas, petitioners were convicted of possessing approximately 215 pounds of marihuana with the intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner Wyatt was sentenced to two years' imprisonment, to be followed by a special parole term of three years. Petitioner Willoughby was sentenced to three years' imprisonment, with all but

three months of the sentence to be served on supervised probation, to be followed by a special parole term of three years. The court of appeals affirmed (Pet. App. B).

The stipulated facts showed that a vehicle driven by petitioner Wyatt and in which petitioner Willoughby was a passenger was stopped by Border Patrol officers at a fixed immigration checkpoint near Falfurrias, Texas, on October 30, 1972, for a "routine immigration check" (Pet. App. 19-20). After ascertaining that both occupants were citizens of the United States, the officers asked petitioner Wyatt to open the trunk of the vehicle to check for the presence of concealed aliens. When Wyatt opened the trunk, the officers detected a strong odor of marihuana. An examination of suitcases in the trunk revealed the marihuana that petitioners were convicted of possessing (*id.* at 20).

Petitioners contend that *Almeida-Sanchez* v. *United States*, 413 U.S. 266—which invalidated a warrantless "roving patrol" search of an automobile for concealed aliens, conducted without probable cause to believe that the vehicle contained aliens—should be applied retroactively to invalidate the search of their vehicle at a fixed immigration checkpoint. However, this Court held in *Bowen* v. *United States*, No. 73-6848, decided June 30, 1975, that *Almeida-Sanchez* should not be applied retroactively to require the suppression of evidence seized pursuant to a pre-*Almeida-Sanchez* search of a vehicle for aliens at a fixed immigration checkpoint. Since the search of

petitioner's vehicle occurred prior to the *Almeida-Sanchez* decision, the court of appeals correctly affirmed petitioners' conviction on the authority of *Bowen* (Pet. App. 16-17). See also *United States* v. *Peltier*, No. 73-2000, decided June 25, 1975.

Contrary to petitioners' assertion, *Bowen* is not distinguishable on the ground that *Almeida-Sanchez* was decided prior to their trial. It is the prevailing Fourth Amendment law at the time the officer acted, not at the time of trial, that determines the applicability of the exclusionary rule. See, *e.g.*, *Bowen* v. *United States*, *supra*, slip op. 4; *United States* v. *Peltier*, *supra*, slip op. 11; *Desist* v. *United States*, 394 U.S. 244, 253.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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